

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, ex rel.)
W. A. DREW EDMONDSON, in his capacity as)
ATTORNEY GENERAL OF THE STATE OF)
OKLAHOMA and OKLAHOMA SECRETARY)
OF THE ENVIRONMENT J. D. STRONG,)
in his capacity as the TRUSTEE FOR NATURAL)
RESOURCES FOR THE STATE OF OKLAHOMA,)

Plaintiff,)

vs.)

) 05-CV-0329 GKF-PJC

TYSON FOODS, INC., TYSON POULTRY, INC.,)
TYSON CHICKEN, INC., COBB-VANTRESS, INC.,)
AVIAGEN, INC., CAL-MAINE FOODS, INC.,)
CAL-MAINE FARMS, INC., CARGILL, INC.,)
CARGILL TURKEY PRODUCTION, LLC,)
GEORGE'S, INC., GEORGE'S FARMS, INC.,)
PETERSON FARMS, INC., SIMMONS FOODS, INC.,)
and WILLOW BROOK FOODS, INC.,)

Defendants.)

DEFENDANT PETERSON FARMS, INC.'S TRIAL BRIEF

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hereby joins in and adopts as its own the Trial Briefs filed by and on behalf of the other Defendants.

I. PLAINTIFFS SHOULD NOT BE ALLOWED TO USE THE *POULTRY WATER QUALITY HANDBOOK* WITH THEIR EXPERTS DURING TRIAL

As requested by the Court during the Pretrial Conference of September 4, 2009, Peterson offers its position regarding the inadmissibility of the *Poultry Water Quality Handbook* absent application of the learned treatise exception to the general hearsay rule. The question raised by the Court and addressed herein is whether, absent qualification of the *Poultry Water Quality Handbook* (“Handbook”) as a learned treatise under Federal Rule of Evidence 803(18),¹ Plaintiffs should be permitted to read portions of the Handbook to their expert witnesses and ask for their agreement with the passage. Peterson maintains, as it did during the Pretrial Conference, that Plaintiffs should be prohibited from employing this practice at trial for the reasons that follow:

A. Use of the Handbook to solicit “do you agree” testimony is inadmissible hearsay whether or not the witness asked to provide the testimony is an expert witness

In its Motion in Limine Regarding the Poultry Water Quality Handbook (Dkt. #2396) and the supporting Reply, Peterson argued that Plaintiffs’ use of the Handbook for soliciting “do you agree” testimony from various fact witnesses, regarding the truth of the matter asserted in the Handbook, was inadmissible hearsay. In turn, Plaintiffs responded that the Handbook may be—

¹ The Court made clear during the Pretrial Conference that the Handbook is not a learned treatise. Nonetheless, to the extent Plaintiffs continue to assert that it is, they must establish a proper foundation for its admission. Although not applicable to the Handbook, “[i]t is not enough that the journal in which it appeared was reputable; the author of the particular article had to be shown to be an authority before the article could be used consistently with Fed. R. Evid. 803(18).” *Twin City Fire Ins. Co v. Country Mut. Ins. Co.*, 23 F.3d 1175, 1184 (7th Cir. 1994). A proper foundation requires, among other things, that the sponsoring expert witness establish that he/she recognizes it as a reliable authority in the field and that he/she relied on it as authority to corroborate his or her opinions. *See Graham v. Wyeth Lab*, 906 F.2d 1399, 1412 (10th Cir. 1990); *Dartez v. Fireboard Corp.*, 765 F.2d 456, 465 (5th Cir. 1985).

without ever saying that it actually is—qualified as a learned treatise, which would necessarily limit the use of the Handbook to Plaintiffs’ expert witnesses. *See* Fed. R. Evid. 803(18). The Court’s skepticism regarding Plaintiffs’ position on the learned treatise issue was well-taken. The Handbook is not a learned treatise, and as it pertains to Plaintiffs’ expert witnesses, it does not fit within any hearsay exception that might otherwise allow Plaintiffs to solicit their “do you agree” testimony from their expert witnesses.

The question raised by the Court at the Pretrial Conferences differs only slightly in form from the otherwise accepted use of a learned treatise under Federal Rule of Evidence 803(18). Under Rule 803(18), an expert witness is allowed to read portions of a duly qualified learned treatise into the record and is prohibited from offering the document as an exhibit. *See id.* Rule 803(18) necessarily places a substantial burden on the proponent of the otherwise hearsay statements. By extension, the proponent of such hearsay evidence, in this case Plaintiffs, should not enjoy a lightened burden simply because an attorney reads hearsay statements, which have not been qualified as a learned treatise, to an expert witness for the witness’s agreement.

While expert witnesses are afforded some leeway under the Federal Rules of Evidence with regard to hearsay materials, *see* Fed. R. Evid. 703, were Plaintiffs to seek “do you agree” testimony from any of its expert witnesses, without initially demonstrating that the proposed testimony fits within an exception to the hearsay rule, the testimony remains inadmissible hearsay despite being sponsored by an expert witness. Federal Rule of Evidence 703 provides, in pertinent part, as follows:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. . . . *Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.*

Id. (emphasis and underlining added). Rule 703, which was amended in December 2000, “provides a presumption against disclosure to the jury of information used as the basis of an expert’s opinion and [is] not admissible for any substantive purpose, when that information is offered by the proponent of the expert.” Fed. R. Evid. 703, Advisory Notes for 2000 Amendment.²

As such, “when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted.” *Id.* Thus, despite the balancing test in the amended rule, Rule 703 does not permit wholesale admissibility of otherwise inadmissible and/or hearsay evidence. See *United States v. Steed*, 548 F.3d 961, 975 (11th Cir. 2008) (noting “‘Rule 703 . . . is not an open door to all inadmissible evidence disguised as expert opinion’”); *United States v. Scrima*, 819 F.2d 996, 1002 (11th Cir. 1987) (same); *Boim v. Holy Land Foundation for Relief & Development*, 549 F.3d 685, 703 (7th Cir. 2008) (commenting that “a judge must take care that the expert is not being used as a vehicle for circumventing the rule against hearsay”). Instead, the proponent of the expert must satisfy a number of foundational requirements before the otherwise inadmissible materials could be presented to the fact finder and, then, the use of the materials is limited to explaining the expert opinion.

As a preliminary matter, before offering the otherwise inadmissible materials to the fact finder, the subject materials must be “of a type [of fact or data] reasonably relied upon by experts

² Notably, the present practice under the amended Rule 703 differs from prior version of the evidentiary rule, which allowed broader leeway to the testifying expert. Cf. *Black v. M&W Gear Co.*, 269 F.3d 1220, 1228 n.3 (10th Cir. 2001) (discussing pre- and post-amendment practices under Rule 703); *Kinsler v. Gehl*, 184 F.3d 1259, 1275 (10th Cir. 1999), overruled by Fed. R. Evid. 703 (2000 Amendment) (allowing expert to testify regarding content of inadmissible evidence on which opinion was based).

in the particular field.” Fed. R. Evid. 703. As such, Plaintiffs would be required to demonstrate that the Handbook—a decade-old, out of print, proprietary publication sponsored by an industry organization—satisfies this threshold requirement for one or more of their experts. Such a requirement would necessitate that Plaintiffs undertake an examination of their witness(es) not altogether unlike that discussed in Peterson’s Motion (Dkt. #2396 at 8) for qualification of a publication as a learned treatise. *See Baker v. Barnhart*, 457 F.3d 882, 891 (8th Cir. 2006); *Schneider v. Revici*, 817 F.2d 987, 991 (2d Cir. 1987). Furthermore, were Plaintiffs able to satisfy their threshold burden, Rule 703 “does not afford the expert unlimited license to testify . . . without first relating that testimony to some ‘specialized knowledge’ on the expert’s part as required under Rule 702.” *United States v. Johnson*, 54 F.3d 1150, 1157 (4th Cir. 1995). As such, Plaintiffs must demonstrate that the selected content of the Handbook relates to the expertise of their witness(es), who based an opinion on the Handbook.

Finally, if Plaintiffs satisfy the aforementioned burdens and “[i]f the otherwise inadmissible information is admitted under th[e] balancing test, the trial judge must give a limiting instruction upon request, informing the jury *that the underlying information must not be used for substantive purposes*.” Fed. R. Evid. 703, Advisory Notes for 2000 Amendment (emphasis added). As is clear from the text of Rule 703 and the notes for the 2000 Amendment, the otherwise inadmissible materials cannot be offered to the fact finder for any and all purposes. Such a practice would run afoul of the general prohibition against employing Rule 703 as an end run around the general hearsay rule. *See Steed*, 548 F.3d at 975; *Scrima*, 819 F.2d at 1002; *Boim*, 549 F.3d at 703. Instead, the otherwise inadmissible materials, i.e., selected content of the Handbook, may only be used for the limited purposes of assisting the fact finder to understand

the expert opinion. *See* Fed. R. Evid. 703 (noting that under the balancing test the inadmissible materials may be used in “assisting the jury to evaluate the expert’s opinion”).

In the instant case, absent qualifying the Handbook as a learned treatise (which they cannot do), Plaintiffs are prohibited from reading statements from the Handbook to their experts for purposes of offering the truth of any statement in the Handbook. To the extent Plaintiffs seek to use the Handbook with their experts, such use must be limited to that allowed under Rule 703 to assist the fact finder in understanding an expert opinion, subject to satisfaction of Plaintiffs’ preliminary burdens and the Rule 703 balancing test. As previously noted, Plaintiffs’ agricultural economist Robert Taylor appears to be the only witness among Plaintiffs’ stable who cited or otherwise made use of the Handbook in formation of his opinions; and that use was limited to single citation in support of a proposition regarding a purported awareness of water quality issues dating to the 1970s. *See* Dkt. #2554 at 6 n.4. Thus, Plaintiffs would need to satisfy each of these burdens with respect to Dr. Taylor and his limited use of the Handbook in formulation of his opinions in this matter. Otherwise, use of the Handbook with Plaintiffs’ expert witnesses should be prohibited at trial.

B. Plaintiffs’ solicitation of “do you agree” testimony from their expert witnesses is prohibited by Federal Rule of Evidence 611(c)

In addition to the foregoing, Plaintiffs would also be prohibited from soliciting their experts’ agreement with the Handbook as a matter of procedure, since the mode of such interrogation is proscribed by Federal Rule of Evidence 611(c). In this regard, the “do you agree” testimony that Plaintiffs have solicited throughout discovery and that which they would solicit from their experts at trial is necessarily obtained through leading questions.

Rule 611(c) provides, in pertinent part, that “[l]eading questions should not be used on the direct examination of a witness,” with exceptions not applicable to Plaintiffs’ expert

witnesses on the issue before the Court. A “leading question” is “one which suggests to [the] witness [the] answer desired, or a question admitting of being answered by a simple ‘yes’ or ‘no’.” BLACK’S LAW DICTIONARY 888-89 (6th ed. 1990); *see Grandison v. State*, 670 A.2d 398, 450 (Md. 1995) (noting that “a long, rambling statement . . . coupled with an invitation to the witness to agree with that statement [i]s a classic example of an objectionable leading question”); *see also United States v. Crumpler*, 229 Fed. Appx. 832, 838 (11th Cir. 2007) (discussing trial court’s prohibition on making “a long, rambling, compound statement and then say . . . Do you agree?”).

In the examples cited to the Court in Peterson’s Reply, *see* Dkt. #2554 at 2, Plaintiffs follow this otherwise prohibited practice of reading the witness a “long, rambling, compound statement” and, then, asking for the witness’s agreement with the statement. Notwithstanding the hearsay issues associated with the practice, whether the statement is read to a fact witness or an expert witness, the practice nonetheless amounts to an impermissible interrogation of the witness under Rule 611(c). Absent a hostile expert witness, which is an unlikely event, Plaintiffs are prohibited from asking substantive, leading questions of their expert witnesses. Accordingly, for this additional reason, Plaintiffs are prohibited from soliciting “do you agree” testimony from their experts regarding the content of the Handbook.

II. PLAINTIFFS LACK DIRECT OR CIRCUMSTANTIAL EVIDENCE LINKING PETERSON TO ANY ALLEGED INJURY IN THE IRW

As argued by Defendants, and as recently conceded by Plaintiffs, Plaintiffs must prove their claims against each, separate Defendant. However, as was the case at the hearing on their Motion for Preliminary Injunction, Plaintiffs do not have any evidence, whether direct or circumstantial, causally linking Peterson to any alleged injury. *Cf. Attorney General of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 777 (10th Cir. 2009) (noting that “the court denied the

[preliminary] injunction as a result of Oklahoma's failure to establish a causal link between land application of poultry litter and bacteria in the IRW"). Indeed, the evidence relied on at the aforementioned hearing is largely the same as the evidence expected at trial.

As previously briefed in *Defendants' Motion for Partial Summary Judgment Dismissing Counts 1, 2, 3, 4, 5, 6 and 10 Due to Lack of Defendant-Specific Causation and Dismissing Claims of Joint and Several Liability under Counts 4, 6 and 10* (Dkt. #2069 at 16-21) and incorporated herein by reference, causation, or other evidentiary link between the subject conduct and alleged injury, is an essential element of each of Plaintiffs' remaining claims in this lawsuit. *See* Dkt. No. 2259 at 1-8; PROSSER AND KEETON ON TORTS § 41, at 263 (5th ed. 1984); *Twyman v. GHK Corp.*, 93 P.3d 51, 54 n.4 (Okla. Civ. App. 2004) (tort law causation); *Angell v. Polaris Prod. Corp.*, 280 Fed. App. 748, 2008 U.S. App. LEXIS 12007 (10th Cir. June 4, 2008) (same); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 114 (Mo. 2007) (same); 42 U.S.C. § 6972(a)(1)(B) (RCRA causation); *Attorney General of the State of Oklahoma v. Tyson Foods*, 565 F.3d 769, 776-79 (10th Cir. 2009) (same); *see also Opinion and Order*, Dkt. No. 1765 at 7 (Sept. 29, 2008) (Frizzell, J.) (same).

Despite their recent concession as to their burden of proof, Plaintiffs have otherwise contended throughout these proceedings that they are relieved of proving causation as to Peterson or any other separate defendant, because their alleged injury is purportedly indivisible. This contention misses the mark. Foremost, "[t]he divisibility or indivisibility of injuries does not rest on the nature of the injuries but on the element of causation." *Turcon Constr., Inc. v. Norton-Villiers, Ltd.*, 139 Cal. App. 3d 280, 284 (1983). Moreover, under Oklahoma law, Plaintiffs cannot rely on industry-wide or commodity based "non-identification" or collective liability theories to make their causation case against Peterson or any other separate defendant.

See Wood v. Eli Lilly & Co., 38 F.3d 510, 512-13 (10th Cir. 1994) (finding Oklahoma would not adopt “alternative liability” theories); *Case v. Fibreboard Corp.*, 743 P.2d 1062, 1067 (Okla. 1987) (same). As such, Plaintiffs have the burden, which they cannot satisfy, to establish causation specifically linking Peterson to the injuries alleged underlying their remaining claims from the Second Amended Complaint. *See, e.g., In re Williams Sec. Litig.*, 558 F.3d 1130, 1136 (10th Cir. 2009).

In any event, Plaintiffs’ *direct* evidence in support of its claims against Peterson does not establish a causal, or other, link between Peterson and any alleged injury to the waters of the State of Oklahoma, whether based on bacteria or orthophosphates. Indeed, Plaintiffs’ direct evidence against Peterson is limited to sampling activities of three former contract growers: Plaintiffs sampled the operations of Two-Saun Farms and O’Leary Farm, and took edge of field samples from a property where Plaintiffs allege poultry litter from Waymon Rhodes’ farm was land applied. *See* Dkt. #2397 at 16-18. Of these samples, the presence of pathogenic bacteria was detected in a sample from Two-Saun Farms³ and in the edge of field sample taken near Mr. Rhodes’ property. *Id.* at 13. Of note, however, Mr. Rhodes’ operations are located in Siloam Springs, Arkansas. Regardless, Plaintiffs did not identify any pathogenic bacteria in any of the litter samples taken from any of these farms, and they did not conduct any fate and transport analysis tracing either bacteria or orthophosphates from any of these three farms to any water body in the IRW. *Id.*; *see also* Dkt. #2069-2 at 4-5 (Joint Appendix of Defendant- Specific Facts summarizing absence of direct evidence supporting claims against Peterson).⁴

³ The sample was obtained from a spring used as a watering source for cattle on Two-Saun Farms. Documentary evidence of the spring depicts cattle manure in the vicinity of the sampling location.

⁴ The facts discussed in the Joint Appendix include, *inter alia*, (1) Plaintiffs’ concessions that Peterson has never owned or operated a poultry farm in the IRW; (2) Plaintiffs’ concession that

In addition, Plaintiffs' circumstantial evidence likewise fails to link Peterson, its conduct or any conduct attributable to it, regardless of theory, to any alleged injury to the IRW. Although Plaintiffs are not prohibited from offering circumstantial evidence in support of their claims, they are prohibited from coupling their circumstantial evidence with speculative theories to satisfy their burden of proof. *See Corbitt v. Home Depot U.S.A., Inc.*, 573 F.3d 1223, 1243 (11th Cir. 2009). In other words, Plaintiffs' reliance upon circumstantial evidence is not a license to stack inference upon inference or otherwise engage in unsupported speculation as to causation with regard to Peterson or any other Defendant. *See O'Laughlin v. O'Brien*, 568 F.3d 287, 301 (1st Cir. 2009); *Amrhein v. Health Care Serv. Corp.*, 546 F.3d 854, 859 (7th Cir. 2008) (noting that circumstantial evidence offered by plaintiffs was too speculative to support triable issue); *Newman v. Metrish*, 543 F.3d 793, 796-97 (6th Cir. 2008) (noting that "there are times that [circumstantial evidence] amounts to only a reasonable speculation and not to sufficient evidence"); *see also Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 521 (10th Cir. 1987) (noting that inferences drawn from circumstantial evidence must amount to more than conjecture or speculation).

Nonetheless, Plaintiffs have maintained throughout these proceedings that their "circumstantial" case is based almost exclusively upon the nonspecific opinions of their team of experts. Of note, Plaintiffs have disclaimed that Dr. Christopher Teaf is a causation expert, and Plaintiffs' primary causation experts, Dr. Jody Harwood and Dr. Roger Olsen, will not be allowed to offer their causation-related opinions at trial. As such, by default, Dr. Bert Fisher is Plaintiffs' primary, if not only, expert with regard to causation or otherwise linking Peterson to

Peterson has not land applied or stored poultry litter in the IRW; and (3) Plaintiffs' concession that they lack evidence that any former contract grower violated his or her Animal Waste Management Plan or Nutrient Management Plan. *See* Dkt. #2069-2 at 4-5.

any alleged injury in the IRW. However, based on his deposition testimony, Dr. Fisher cannot establish the requisite link between Peterson and any alleged injury, to wit:

- The only alleged pollutants at issue in this lawsuit are bacteria and orthophosphates. *See* Fisher Depo., dated 9/4/2008, at 451 (hereinafter “Fisher II”), attached hereto as Ex. 1.
- Dr. Fisher will not offer any opinions at trial regarding causation related to alleged bacterial contamination. *See* Fisher II at 503.
- Dr. Fisher cannot attribute all orthophosphates in high flow events to poultry litter and, indeed, knows that other sources contribute to the orthophosphate levels in high flow events. *See* Fisher Depo., dated 9/3/2008, at 52-53 (hereinafter “Fisher I”), attached hereto as Ex. 2.
- Other than limited field notes, Dr. Fisher does not have any information regarding the existence of cattle in fields adjacent to edge of field sampling locations. *See* Fisher I at 65.
- Dr. Fisher did not investigate whether commercial fertilizer was used on any field adjacent to edge of field sampling locations. *See* Fisher I at 67.
- Dr. Fisher cannot identify a single instance in which either a Defendant, including Peterson, land applied poultry litter on any piece of property in the IRW or litter from a Defendant owned, operated or managed farm was land applied in the IRW. *See* Fisher I at 74, 100; Fisher II at 476.
- Dr. Fisher cannot identify a single poultry grower, including any grower formerly under contract with Peterson, who land applied litter which was alleged to have runoff into any water body in the IRW. *See* Fisher I at 80-82; Fisher II at 477-78.
- None of the other experts retained by Plaintiffs have done a site-specific fate and transport analysis, tracing any substance from field to water body. *See* Fisher I at 83-83.
- Dr. Fisher cannot identify a specific field where edge of field runoff has made its way to any water body in the IRW. *See* Fisher I at 86.
- Dr. Fisher cannot identify any grower whose land application of litter has contaminated groundwater. *See* Fisher I at 86.
- Dr. Fisher’s “fingerprinting” opinions are directed at litter as a *commodity* and are not intended to be Defendant-specific. *See* Fisher I at 217-18.
- Dr. Fisher is not offering any opinion that poultry litter is the source of contamination for any particular sample taken in this matter. *See* Fisher I at 253, 260-61.

- Dr. Fisher is not offering any opinion that any specific field location is contaminated by poultry litter. *See* Fisher I at 266, 268-69.
- Dr. Fisher cannot identify any specific edge of field sample that is contaminated with poultry litter. *See* Fisher I at 283-84.
- Dr. Fisher is not offering any opinion that the edge of field samples are polluted. *See* Fisher II at 459.
- Dr. Fisher acknowledges that runoff from fields never receiving poultry litter may contain both bacteria and orthophosphates. *See* Fisher II at 462.
- Dr. Fisher has not identified any deep aquifer or well contaminated with poultry litter. *See* Fisher II at 511-12.
- Plaintiffs do not possess a full suite of samples (i.e., litter samples, soil samples and edge of field samples) for the same location, farm or location. *See* Fisher II at 549.
- Dr. Fisher cannot connect any alleged pollution of groundwater or definable stream to the operations of any of Peterson's former contract growers. *See* Fisher II at 558-59.

In short, Plaintiffs' circumstantial evidence does not establish sufficient evidence to link Peterson with any alleged injury in the IRW. Instead, Plaintiffs, as has been their practice throughout these proceedings, couple their circumstantial evidence with speculative and unsupported theories which does not otherwise support a triable issue as to causation.

Because Plaintiffs' evidence remains insufficient for the fact-finder to assign liability to Peterson without aid of speculation or conjecture, Peterson maintains that it will be entitled to a directed verdict at the close of Plaintiffs' evidence. Indeed, a directed verdict, or judgment as a matter of law, is proper, "[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient basis to find for a party on that issue." Fed. R. Civ. P. 50(a)(1).

III. PLAINTIFFS LACK ANY EVIDENCE REGARDING PETERSON'S ALLEGED VIOLATION OF 27A O.S. § 2-6-105(A)

In addition to the foregoing, Plaintiffs do not have sufficient evidence to establish that Peterson has violated OKLA. STAT. tit. 27A, § 2-6-105(a). Section 2-6-105(a) provides, in pertinent part, as follows: “It shall be unlawful for any person to cause pollution of any waters of the state or to *place or cause to be placed any wastes in a location where they are likely to cause pollution* of any air, land or waters of the state.” OKLA. STAT. tit. 27A, § 2-6-105(a) (emphasis added).

On its face, as indicated by the italicized language, Section 2-6-105(a) contains a requisite element of site specificity: Plaintiffs must establish “a location where [wastes] are likely to cause pollution.” *Id.* Thus, under the State of Oklahoma’s regulatory regime, as administered by its environmental agencies including the Oklahoma Department of Agriculture, Food and Forestry (“ODAFF”), Plaintiffs must necessarily demonstrate that Peterson, whether on its own or—under Plaintiffs’ theory of the case—through its former growers,⁵ violated the substantive provisions of the Animal Waste Management Plans (“AWMPs”) issued to the former growers within the IRW for land application of litter at specific locations identified in the plans. *See* OKLA. STAT. tit. 2, § 10-9.7(C). These plans take into account all of the unique site-specific—indeed, pasture-specific—characteristics of each poultry operation, including soil and litter considerations, *see id.*, and are designed to “remov[e] the threat to water quality” of which Plaintiffs’ complain in this matter. *See* OAC § 35:45-1-6. In other words, AWMPs govern the

⁵ Peterson does not in any way or form concede that Plaintiffs’ various theories of vicarious or agency liability render it responsible or otherwise liable for the conduct of its former contract growers. The legislative and administrative bodies of Oklahoma and Arkansas have enacted statutes and regulations that govern those former growers’ use of poultry litter. Had it been the public policy of either State to regulate the conduct of Peterson or the other Defendants, the legislation would have addressed the obligations of the integrators under the respective body of law.

location and amount of litter application so that its use is not placed in any location “likely to cause pollution.” OKLA. STAT. tit. 27A, § 2-6-105(a); *cf.* OAC 35:17-5-1 (noting rules governing AWMPs “assist in ensuring beneficial use of poultry waste while preventing adverse effects to the waters of the state of Oklahoma”).

While Plaintiffs have consistently argued that these AWMPs are simply “guidance” documents, ODAFF’s regulations, as well as the Oklahoma Environmental Code, plainly refute Plaintiffs’ unsupported contention. *See* OKLA. STAT. tit. 27A, § 1-1-202; OAC § 35:45-1-1 *et seq.* Instead, the AWMPs are part of the State of Oklahoma’s comprehensive “programs and activities . . . to protect the beneficial uses of the state’s waters and to maintain water quality standards.” OAC § 35:45-1-3(a). The applicable water quality standards within ODAFF’s jurisdiction include those related to bacteria and orthophosphates. *See id.* § 35:45-1-4(a)(1) (listing various OWRB-developed water quality standards that fall within ODAFF’s jurisdiction and regulation). The Oklahoma Environmental Code mandates that each environmental agency, including ODAFF, prepare a Water Quality Standards Implementation Plan specifying how programs within its respective jurisdiction will be used to enforce OWRB-developed water quality standards. *See id.* § 35:45-1-1(a).

In this regard, ODAFF has numerous programs directed at water quality standards and related issues associated with animal manures. *See id.* § 35:45-1-7. “These programs include *land application* of animal or poultry waste.” *Id.* § 35:45-1-7(a)(1) (emphasis added).⁶ Among these programs are those dictated by the Oklahoma Registered Poultry Feeding Operations Act, *see* OKLA. STAT. tit. 2, § 10-9.1 *et seq.*, and the Oklahoma Poultry Waste Applicators

⁶ “Land application” is a defined term within the ODAFF regulations as “the application of substances including animal waste and other substances to the land, *at approved rates* within the capacity of the land or crops.” OAC § 35:45-1-2 (emphasis added). By statute, the approved rates of application for poultry litter are determined pursuant to most current version of the NRCS Code 590. *See* OKLA. STAT. tit. 2, § 10-9.7(D)(3).

Certification Act, *see id.* § 10-9.16 *et seq.* ODAFF describes its administration of these various programs as follows:

The animal waste programs can affect groundwater and surface water beneficial uses if facilities are not designed and operated properly. The application process [*see, e.g.,* OKLA. STAT. tit. 2, §§ 10-9.3, 10-9.4, 10-9.5] is *targeted at removing the possible threat of pollution to the waters of the State* by not allowing any discharge to surface water except in limited circumstances, . . . by preparing or reviewing *animal waste management plans*, nutrient management plans, or equivalent, emphasizing best management practices and conservation measures, and by routine inspections of regulated . . . *poultry feeding operations*.

OAC § 35:45-1-7(c)(2) (emphasis added); *see id.* § 35:45-1-7(a)(7) (“Poultry feeding operations that are located in nutrient limited watersheds or nutrient vulnerable groundwaters as designated by OWRB shall meet soil and litter testing and litter application rate requirements per 2 O.S. § 10-9.7(E).”); *id.* § 35:45-1-7(d)(1) (“The application process evaluates the potential effects of the proposed operation on the waters of the State to insure that both groundwater and surface water are not polluted.”).

Furthermore, these ODAFF regulations further embody the site specificity requirements of Section 2-6-105(a), to wit: “The [animal waste] programs evaluate facility location, watershed, soils, groundwater data, stream data, flood information, water samples, manure and litter samples, and other pertinent information.” OAC §35:45-1-7(d)(1). Accordingly, the site-specific AWMPs (which also incorporate the site-specific provisions of the NRCS Code 590) required under the Registered Poultry Feeding Operations Act, *see* OKLA. STAT. tit. 2, § 10-9.7(C), are a predominant feature of the State of Oklahoma’s and ODAFF’s comprehensive regulatory programs to address the potential, site-specific pollution risk that is the subject of OKLA. STAT. tit. 27A, § 2-6-105(a), among other provisions of Oklahoma law.

In this case, however, Plaintiffs have not developed any evidence that Peterson or any of its former contract growers have violated the substantive provisions of an AWMP within the

Oklahoma portion of the IRW.⁷ For instance, Plaintiffs' expert witnesses have not opined that any grower is in violation of his or her site-specific AWMP: Dr. Fisher testified that he was not aware of any violations of AWMPs during his extensive investigations of the IRW. *See* Fisher II at 473; Fisher Depo, 1/23/2008, at 262-66, 268, attached as Ex. 3.⁸ Dr. Gordon Johnson, another of Plaintiffs' experts, did not consider AWMPs in forming his opinions in this case and was generally unaware of any AWMP violations. *See* Johnson Depo., 8/18/2008, at 28, 112-13, 176, attached as Ex. 4. Moreover, Terry Peach, who is the chief regulator at ODAFF, is unaware of any violation of the applicable Oklahoma laws by the poultry integrators. *See* Peach Depo., 4/10/2009, at 96, 115-17, attached as Ex. 5. Similarly, John Littlefield, who is an ODAFF poultry inspector, is unaware of any violation of Oklahoma law by any of Peterson's former contract growers who were under his supervision. *See* Littlefield Depo., 8/2/2007, at 139-42, attached as Ex. 6.

In short, Plaintiffs cannot demonstrate a violation of Section 2-6-105(a) which can be attributed to Peterson under any theory of liability, because they cannot demonstrate a violation of a site-specific AWMP in the Oklahoma portion of the IRW. Consequently, if the evidence at trial is as expected, Peterson contends that it will be entitled to directed verdict or judgment as a matter of law on Plaintiffs' Count 7 at the close of their case in chief. *See* Fed. R. Civ. P. 50(a)(1).

⁷ During trial, Plaintiffs may proffer evidence that one of Peterson's former contract growers violated provisions of the Oklahoma Registered Poultry Feeding Operations Act. However, this violation pertained to the education requirements of the legislation, and not to the substantive litter management provisions of an AWMP.

⁸ Of note, Dr. Fisher's testimony in Ex. 3 pertains to Waymon Rhodes' operations in Arkansas, which would necessarily be irrelevant to Plaintiffs' Count 7.

IV. CONCLUSION

For the reasons stated herein and in its Motion in Limine (Dkt. #2396), Defendant Peterson Farms, Inc. requests the Court for an Order excluding and/or limiting use of the *Poultry Water Quality Handbook* by or through Plaintiffs' expert witnesses in any matter inconsistent with or inadmissible under the Federal Rule of Evidence, including but not limited to Rules 611, 703, 801 and 803. In addition, at the close of Plaintiffs' evidence, Peterson anticipates asking the Court for judgment as a matter of law, pursuant to Federal Rule of Civil Procedure 50(a), based on the insufficiency of Plaintiffs' evidence to link causally or otherwise Peterson to any alleged injury in the IRW, regardless of Plaintiffs' theory of liability.

Respectfully submitted,

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